SUPREME COURT, U. S.

FEB 17 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1166

COLUMBIA STEAMSHIP COMPANY, INC., a corporation,

Petitioner,

v.

AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHER, SPAULDING, KINSEY, WILLIAMSON & SCHWABE
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed January 16, 1975.

OPINIONS BELOW

The oral opinion of the District Court of May 5,

1972, holding that the petitioner had failed to establish a prima facie case of concert of action within the meaning of § 810 of the Merchant Marine Act of 1936 is not reported but appears in Appendix A hereto, infra, App. A, p. A25. The written opinion of the District Court of September 6, 1972, dismissing petitioner's complaint is unreported but appears in Appendix A hereto, infra, App. A, p. A17. The opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the District Court is reported at 510 F.2d 29 (9th Cir. 1975) and appears in Appendix A hereto, infra, App. A, p. A2.

JURISDICTION

The opinion of the United States Court of Appeals was filed on January 16, 1975. On November 18, 1975, the Court entered an order directing the clerk of the court to issue the mandate, thereby making its judgment final. The court's order appears in Appendix A, infra, App. A, p. A1. Petitioner's motion for recall of the mandate was denied on December 15, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The Merchant Marine Act of 1936 (46 U.S.C. 1171 et seq) sets forth the conditions precedent to receipt of operating differential subsidy. In its decision, the Court of Appeals held, as a matter of law, that a sub-

sidized carrier is entitled to earn operating differential subsidy for the carriage of cargo which is not subject to foreign competition.

The question presented by the court's decision is whether a carrier by sea may earn operating differential subsidy for the carriage of military and/or preference cargo which is exempt from any form of foreign competition.

STATUTES INVOLVED

A. Merchant Marine Act, 1936, as amended, 49 Stat. §§ 1985 ff., 46 U.S.C. §§ 1101 ff., and particularly §§ 601, 602, 603, and 605, 46 U.S.C. §§ 1171, 1172, 1173 and 1175(a) and (c) authorizing payment under certain conditions of operating differential subsidy for the operation of a vessel and § 901 (b), 46 U.S.C. §§ 1241 (b), granting preference to vessels of American registry in the carriage of cargo paid for or financed by the United States. Said statute appears in Appendix B, pp. A23-A32.

B. Merchant Marine Act of 1936, as amended, § 810, 49 Stat. 2015, 46 U.S.C. § 1227 prohibiting a concert of action between carriers by water which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water. Said statute appears in Appendix B, pp. A22-A23.

C. The Act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631, granting preference to vessels of American registry with respect to military cargo. Said statute appears in Appendix B, p. A33.

D. P. Res. 17, 73 Cong., 48 Stat. 500 (1934), 15 U.S.C. § 616a, which grants preference to vehicles of American registry with respect to cargo financed by the export-import bank of the United States. Said statute appears in Appendix B, p. A33.

E. The Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U.S.C. § 2. Said statute appears in Appendix B, p. A22.

STATEMENT OF THE CASE

1. Proceedings in the District Court.

Petitioner is a common carrier by sea. Its amended complaint alleged violation of § 2 of the Sherman Act; of 46 U.S.C. §§ 814-817; and of 46 U.S.C. § 1227 of the Merchant Marine Act of 19[illegible]. Petitioner sought both damages and injunctive relief in consequence of the violations which it alleged.

After joining issue, the parties entered into a stipulation pertaining to petitioner's claim under § 810 of the Merchant Marine Act of 1936 (46 U.S.C. § 1227) (R. 107-110).

Pursuant to the stipulation, the trial court segregated, for separate determination, the question of whether the facts set forth within the stipulation established a prima facie case that respondents had conformed to an agreement with or engaged in any practice in concert with another carrier within the meaning of § 810 (R. 107-110). On May 5, 1972, the trial court rendered an oral opinion holding that pe-

titioner had failed to establish a prima facie case of concert of action within the meaning of § 810 of the Merchant Marine Act (App. A, p. A15). On June 2, 1972, the Court entered an order consistent with its oral opinion and further directed petitioner to file a brief setting forth its legal theory with respect to its claims for relief based upon the Sherman Act, the common law, 46 U.S.C. § 815, and 46 U.S.C. § 1171 et seq (R. 187). On September 6, 1972, the court held that there was no violation of the intent or purpose of 46 U.S.C. § 1171 et seq; that there was no violation of § 2 of the Sherman Act; and that 46 U.S.C. § 815 was not applicable (App. A., p. A17).

2. Decision of the Court of Appeals.

Petitioner appealed from the judgment to the Court of Appeals for the Ninth Circuit, basing jurisdiction upon 28 U.S.C. § 1291. On January 16, 1975, the Court rendered an opinion reserving final judgment until decision was reached in the consolidated civil actions 1576-72, American Maritime Association v. Peterson, Secretary of Commerce, and 1667-72, States Marine International v. Patterson, Secretary of Commerce, which were pending before the United States Court of Appeals for the District of Columbia. In the course of its opinion the court tentatively concluded that the judgment of the District Court of Oregon should be affirmed. In this regard it stated:

> ". . . Should the District Court (District of Columbia) judgment ultimately be affirmed, the mandate shall be issued forthwith. Should the Dis-

trict Court (District of Columbia) judgment ultimately not be affirmed, the mandate shall not be issued and the plaintiff's complaints shall be reconsidered in light of the reasoning supporting the refusal to affirm."

On November 18, 1975, the United States Court of Appeals in the District of Columbia having announced its decision, the Ninth Circuit entered an order instructing the Clerk to issue the mandate.[1] Petitioner moved for recall of the mandate but said motion was denied by the Ninth Circuit on December 15, 1975.

3. Statement of the facts.

The only facts contained in the record are those which were stipulated to for the exclusive purpose of determining whether a concert of action existed within the meaning of 46 U.S.C. § 1227 (R. 108). This stipulation states that Department of Defense cargo and government civilian cargo, not shipped under a conference rate, has been, since 1966, subject to competitive bidding (R. 108).[2] Bids were submitted both by companies operating subsidized vessels and by companies operating unsubsidized vessels.

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[1] The mandate was ordered to be issued despite the fact that the United States Court of Appeals for the District of Columbia did not affirm its own trial court's determination.

[2] This cargo for purposes of simplicity will be collectively referred to as "government" cargo hereinafter.

Bidding occurred on a yearly basis. Bids were placed in each of the various trade routes. First right of refusal vested with the low bidder within a particular trade route. A successful bidder was not obligated to tender space and it could refuse to carry government cargo if its vessel were otherwise filled with cargo. Nevertheless a significant part of the cargo carried by respondents was governmental.

Each subsidized carrier was aware that other subsidized carriers were submitting bids for carriage of government cargo; and was further aware that the revenues produced by their bids and those of other respondents would be, in most all instances, less than the fully distributed cost of operating the vessel (R. 108-110).

Sixty percent of all outbound cargo carried by vessels of the character here involved was government cargo. Unsubsidized carriers, such as petitioner, were dependent upon the carriage of government cargo for their economic survival and each respondent was aware of this fact.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals adversely affects the vitality of the merchant marine and in consequence both the commercial and military stability of the United States. The proper construction of the Merchant Marine Act of 1936 is an important question of Federal law that the Court of Appeals has decided

and it has not been, but should be, settled by this court.[3]

After the turn of the century, it became increasingly apparent to Congress that our merchant marine could not long survive unless subsidized. The need for a strong merchant marine was obvious. Both the commercial ability and the military preparedness of this country depended upon a strong and stable merchant marine.

Our merchant marine was subjected to debilitating competition from foreign flag vessels. These vessels possessed two significant competitive advantages over domestic flag ships. First, their labor costs were substantially lower than those confronted by United States flag vessels. Second, their cost of construction was lower. Establishment of an artificial cost parity through subsidy was essential to prevent Britannia and others from sweeping the seas. Two forms of subsidy, albeit not concurrently, were adopted. The first, for want of more apt terminology, will be entitled "indirect". If foreign flag vessels could be excluded from the competitive market for specific types of cargo, the normal competitive disadvantage of American flag

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[3] A substantially identical issue was raised in the case of American Maritime Association v. Peter G. Peterson, which is presently pending before this Court upon petition for issuance of a writ of certiorari. Judge Jameson of the is presently pending before this Court upon petition for issuance of a writ of certiorari. Judge Jameson of the United States District Court for the District of Montana rendered his opinion in this case before the decision in Pet. App. 1a-2a. By reason of the above and of the central importance of the issue to the maritime industry, it may be appropriate to consolidate these cases, in the event that certiorari is granted, for oral argument.

vessels would disappear. Thus in 1903 Congress erected competitive barriers to foreign flag competition by granting American flag vessels a monopoly over carriage of military cargo.[4] As years passed, other types of cargo were also exempted from foreign competition such as AID, Department of Agriculture and the like.[5] To the extent that the cost to the government on this protected cargo was greater than would result from free competition among all potential flag ships of whatever origin, an indirect subsidy resulted. This reservation to United States flag vessels of government cargo did not contemplate elimination of all competition. It merely eliminated foreign flag vessels as a source of competition.

In 1936 Congress embarked upon another form of subsidy. President Roosevelt's message to Congress set the tone for action. As he stated:

> ". . . It must be based upon providing for American shipping government aid to make up the differential between American and foreign shipping costs. It should cover first, the difference in the cost of building ships; second, the difference in the cost of operating vessels; and finally, it should take into consideration the liberal subsidies that many foreign governments provide for their shipping. Only by meeting this three-fold differential can we expect to maintain a reasonable place in the ocean commerce for ships flying the American flag, and at the same time maintain American standards."[6]

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[4] 10 U.S.C. § 2631.
[5] 46 U.S.C. § 1241(b), 15 U.S.C. § 616(a).
[6] Address to Congress dated May 4, 1935.

The Senate held extensive hearings and the Commerce Committee's report stated:

> ". . . It is the purpose of this bill to endeavor to place the American owner and operator of an American flag ship on a competitive parity with his foreign-flag competitor. 'Parity' carries with it no guarantee of profits, and if there are to be any profits, they must be made in competition with foreign shipping." Senate Report 1721, 74th Congress, Second Session (1935), p. 18.

Senator Crowley stated during the course of hearings:

> "Well, of course it is intended as I understand it, as I understand the statements of the Senators and others who have spoken on it, to provide for a subsidy to put our shipping on a parity with other foreign competitors. Naturally if they have an exclusive trade, where there is not any competition at all, there is nothing to put them on a parity with. . . . It would have to show that they had competition. Just boiled down, that is what it means. If they had no competition from foreign-flag services then the authority would not grant the subsidy. . . ." Senate Hearings S-3500, 74th Congress, Second Session, pp. 60-62.

The necessity of foreign competition as the essential predicate to this direct form of subsidy was hammered home time and again in the precise language of the Act.[7]

The argument of respondents and the conclusion of the Court of Appeals may be simply paraphrased. Each concludes that a subsidized carrier is entitled to earn both indirect and direct subsidy from carriage of

government cargo. This conclusion results in a "double subsidy"; has the thrust of the sword of Damocles with respect to unsubsidized companies; and unless reversed, will have the following effects:

1. Frustration of congressional purpose.

Such an interpretation would defeat the legislative intent. Under this interpretation a subsidized carrier would be entitled to confine its activities to bidding upon and carriage of government cargo and would thus never be exposed to the type of competition which justifies an operating parity allowance.

In addition to the legislative history referred to previously, Congress had the benefit of the Black Report which condemned the 1928 Merchant Marine Act as placing a "murderous economic weapon" in the hands of a favored contractor to be used against his American competitors. Senate Report 898, 74th Congress, First Session, p. 14.

Against this historic backdrop, the colloquy in the Senate Hearing has special meaning.

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[7] See 46 U.S.C. § 1171-1173(b).

"The Chairman: . . . Another is where they enjoy complete monopoly either direct or indirect. Of course, there being no basis for the subsidy to meet the alleged foreign competition, there could be no subsidy awarded because there is no foreign competition.

"The Chairman: Is it really protected trade?

"Mr. Crowley: That is it exactly. There could

be no subsidy there. . . ." S - 3500, 74th Congress, 2nd Session, pp. 60-62.

It is clear that one effect of the Court of Appeals decision is to frustrate the congressional intent.

2. The effect upon a large segment of the maritime industry is devastating.

Operating differential subsidy represented a cushion to subsidized operators against which their beneath cost bids were placed for governmental cargo.

This competitive advantage has and unless abated will continue to drive unsubsidized competitors from the seas. This effect greatly concerned the Federal Maritime Commission. As it commented:

> ". . . Clearly, military rates which fall so low as to seriously impair the maintenance of a financially sound, operationally efficient and adequately equipped American merchant marine fleet must be deemed to be detrimental to commerce of the United States. . . ." 46 C.F.R. 549.3.

The Commission concluded that elimination of these effects was mandatory and it therefore announced a rule, of prospective application, that all military rates must cover fully distributed costs and that operating differential subsidy may not act as a reduction of those expenses. 46 C.F.R. 549.

It is thus certain that the effect of the Ninth Circuit decision is detrimental to commerce of the United States and tends to eliminate the unsubsidized carrier as an effective competitor.

3. Compulsion to become subsidized.

One of the obvious effects of the Court of Appeals' decision is to compel each common carrier by water to apply for subsidy. This effect cannot be conceived to have fallen within the congressional purpose. Subsidy should not be viewed as a goal in itself. Rather, a self-sustaining merchant marine was the focal point of congressional concern. Under the Court's interpretation, a self-sustaining merchant marine, even in part, would, like the aardvark. become a part of history.

4. The cost to government must increase.

The Court of Appeals' construction of the statute compels unsubsidized carriers either to apply for and hope to receive an operating differential subsidy or to find themselves excluded from competition by insurmountable cost barriers. If operating differential subsidy is granted, the direct cost to government will increase. On the other hand, if unsubsidized carriers are excluded from the competitive arena, the long-term outlook is for vastly inflated bids upon governmental cargo. In either eventuality, the cost to government must spiral.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SOUTHER, SPAULDING, KINSEY,
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By: _____
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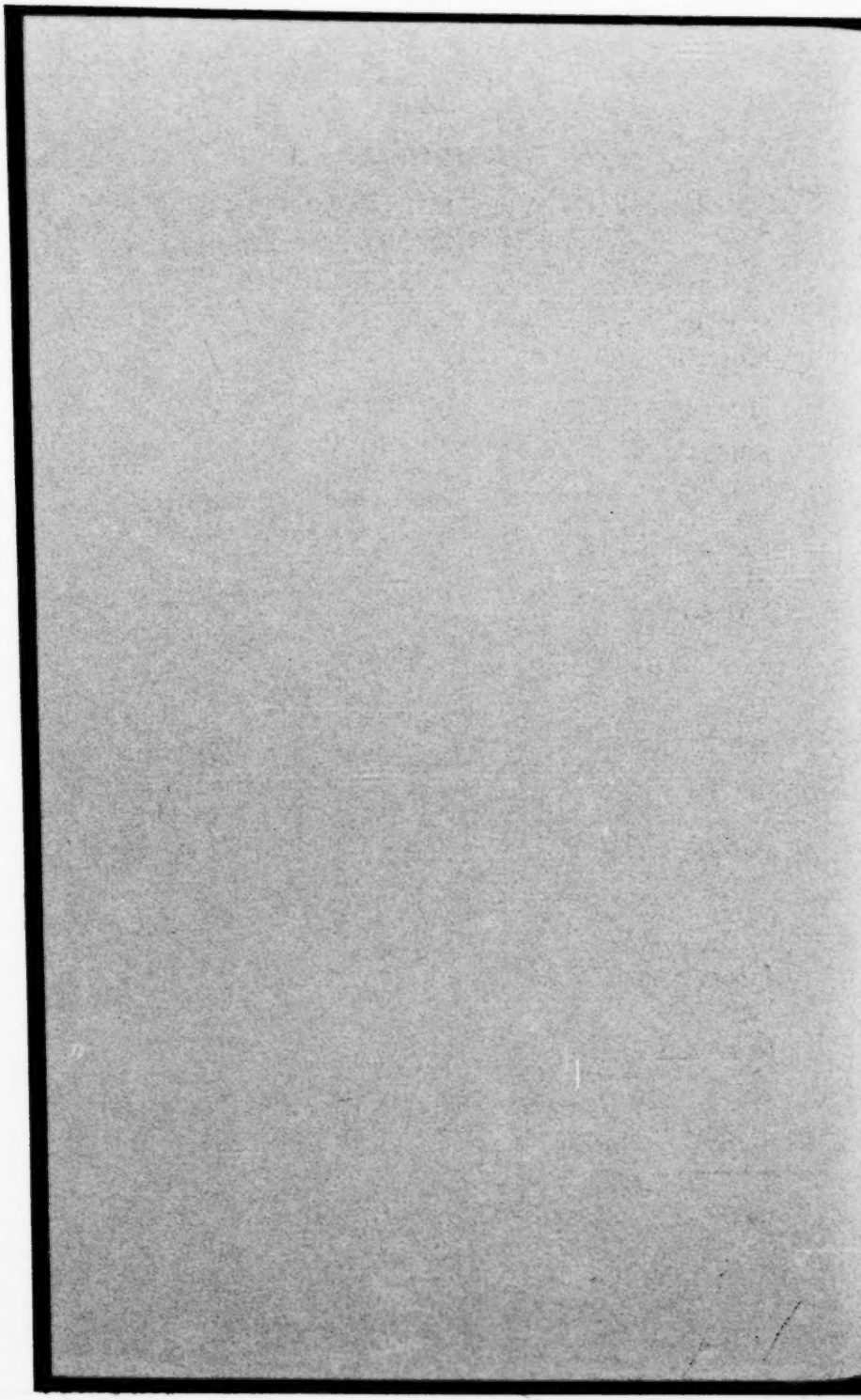

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA STEAMSHIP COMPANY, a corporation, *Appellant*,	)	
vs.	)	
AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC., *Appellees*.	)	No. 72-2943 ORDER

[November 18, 1975]

On Appeal from the United States District Court
for the District of Oregon

Before: KILKENNY and SNEED, Circuit Judges,
and JAMESON,* District Judge.

In view of the holding set forth in *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070 (D.C. Cir. 1975) at 1078 the Clerk of this Court is directed to issue the mandate in this case forthwith.

FOR PUBLICATION

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* Honorable William J. Jameson, United States Senior District Judge, District of Montana, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA STEAMSHIP COMPANY, a corporation, *Appellant*,	)	
vs.	)	
AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC., *Appellees*.	)	No. 72-2943 OPINION

[January 16, 1975]

Appeal from the United Sattes District Court
for the District of Oregon

Before: KILKENNY, SNEED, Circuit Judges, and JAMESON*, District Judge.

SNEED, Circuit Judge:

Columbia Steamship Company, Inc., seeks to recover damages against American Mail Line, Ltd., and certain other shipping lines for alleged violations of (1) section 810 of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1227; (2) section 601 of the same Act, 46 U.S.C.A. § 1171; (3) sections 15-18 of the Shipping Act of 1916, 46 U.S.C.A. §§ 814-817; and (4) sections 1 and 2 of the Sherman Act, 15 U.S.C.A.

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* Honorable William J. Jameson, United States Senior District Judge, District of Montana, sitting by designation.

BLEED THROUGH

§§ 1, 2. The trial court dismissed the complaint. We affirm but stay the mandate until there has been a final disposition of the appeal from the judgment in the consolidated civil actions 1576-72, *American Maritime Association* v. *Peterson, Secretary of Commerce*, and 1667-72, *States Marine International* v. *Paterson, Secretary of Commerce*, rendered by the United States District Court for the District of Columbia. Should the district court's judgment ultimately be affirmed, the mandate shall be issued forthwith. Should the district court's judgment ultimately not be affirmed, the mandate shall not be issued and the plaintiff's complaints will be reconsidered in light of the reasoning supporting the refusal to affirm.

In the proceedings below the trial court ordered the plaintiff to bring forth further evidence regarding the "conspiracy issue," under section 1 of the Sherman Act. Shortly thereafter, the plaintiff amended its complaint to delete any claim based on section 1. Thereafter, the district court determined that the first issue to be tried was whether a stipulation of facts agreed to by the parties established a prima facie case that the defendants "engage[d] in any practice in concert with another carrier . . . which is unjustly discriminatory or unfair . . ." within the meaning of section 810 of the Merchant Marine Act of 1936. The stipulation is brief and is set out in full in the margin.[1]

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[1] Plaintiff and defendants stipulate that a separate determination of the following issue may be ordered by the Court:
Whether plaintiff will have established a prima facie

In essence, the issue posed by this stipulation involves the interaction of legislation which requires that certain types of cargo move on United States flag

case that defendants have conformed to an agreement with or engaged in any practice in concert with another carrier or carriers within the meaning of Section 810 of the Merchant Marine Act of 1936 (46 U.S.C. 1227), where its evidence on the point consists solely of the following facts to which defendants stipulate for the purpose of determining this preliminary issue:

At all times pertinent:

1. Each defendant received the operating differential subsidies provided under the Merchant Marine Act of 1936 for the operation of liner services.

2. All cargo shipped by the Department of Defense and fifty per cent (50%) of the cargo shipped by the civilian agencies of the government was, with immaterial exceptions, limited by law to United States flag ships. A significant part of the cargo carried by defendants was within this category.

3. Department of Defense cargo and government civilian agency cargo not shipped under a conference rate was subject to competitive bidding. In submitting competitive bids for such cargos, each defendant was aware that its revenue would include both freight revenue and the operating differential subsidy, and was aware that other United States flag steamship companies, including the other defendants, were also receiving operating differential subsidies and were submitting competitive bids for cargo so limited by law, and was further aware that unsubsidized operators, including plaintiff, were also submitting bids for such cargo.

No defendant had knowledge of the actual bids submitted by any other defendant prior to any publishing thereof by the government. Since about the year 1966 each defendant became aware of each other defendant's bids subsequent to their publishing by the government and was aware that in the case of most defendants the revenues produced by said defendant bids would be, in most instances, less than fully distributed costs before crediting the operating differential subsidy.[1]

4. Columbia Steamship Co. was an unsubsidized carrier whose vessels were of the break bulk variety. Defendants own and operate numerous break bulk vessels. 60% of the outbound cargo carried by break bulk vessels

vessels[2] and that portion of the Merchant Marine Act of 1936 which provides an operating differential subsidy when, *inter alia*, the operation of the vessel ". . . is required to meet foreign flag competition and to promote the foreign commerce of the United States. . . ." Section 601, Merchant Marine Act of 1936, 46 U.S.C.A. § 1171(a). The plaintiff insists that subsidized carriers may not submit bids for the carriage of preference cargo shipped by the Department of Defense and the civilian agencies of the federal government which are "less than fully distributed costs before crediting the operating differential subsidy." *See* paragraph 3 of Stipulation *n.* 1. To do so, asserts the plaintiff, while aware that other subsidized carriers also are doing so, amounts to engaging in a practice *in concert* with other carriers which is un-

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was military and civil agency cargo. Unsubsidized carriers of break bulk cargo, including plaintiff, were dependent upon carriage of military and civilian agency outbound cargo for their economic survival and each defendant was aware of this fact.[1]

5. The trade routes and the bids submitted with reference thereto by defendants and plaintiff in 1966 to 1971 were set forth in the MSTS Shipping Agreements and Rate Guides attached hereto.

Note 1. The facts set forth in the second and last sentence of Section 3 and the entirety of Section 4 are denied by each defendant but are stipulated to solely for the purpose of determining this segregated issue of law. Nothing stated in said sections shall be construed as an admission against interest or shall in any way be utilized as evidence in the trial or any other proceeding arising out of the subject matter of this litigation.

[2] *E.g.* Cargo Preference Act of 1904, 10 U.S.C.A. § 2631, (military cargo); section 901(b) of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1241(b), (cargo owned or financed by U. S.).

fair and discriminatory with respect to unsubsidized carriers, such as the plaintiff, and constitutes a violation of section 810 of the Merchant Marine Act of 1936.

The district court on the basis of the stipulation held that the plaintiff had failed to establish a prima facie case for such a violation and dismissed the claim based thereon. The district court then turned to the plaintiff's other claims and directed that the plaintiff submit "its brief on whether the use of subsidy by defendants on defense and preference cargoes is unlawful and, if so, what remedies are available to it." Order 71-132, June 2, 1972. This was done and thereafter the district court held (1) that Title VI of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1171-1182, does not prohibit the carriage of preference cargo by subsidized carriers; (2) that, because a large amount of preference cargo moves by rates set by conferences which are influenced by the rates of foreign flag carriers, Title VI does not require that all cargo on subsidized carriers be subject to foreign competition; (3) that section 16 of the Shipping Act of 1916 is inapplicable because it is directed at a carrier's discrimination against shippers and not at competitive activity among carriers and (4) that defendants did not violate section 2 of the Sherman Act because they constantly compete with one another.

Plaintiff appeals on the grounds that the trial court erred in holding (1) that a prima facie case of action in concert, within the meaning of section 810

of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1227, was not established; (2) that there was no violation of Title VI of the Merchant Marine Act of 1938, 46 U.S.C.A. §§ 1171-82; and (3) that there was no violation of section 2 of the Sherman Act without first affording the plaintiff an opportunity to develop a factual record in support of its allegations.

I

Although not relied upon by the plaintiff and quite understandably, not strongly argued by the defendants, we must determine at the outset whether the doctrine of primary jurisdiction requires that we reverse dismissal of the complaint and remand with instructions to stay the action until the Maritime Subsidy Board and the Secretary of Commerce, possibly in conjunction with the Federal Maritime Commission, have had the opportunity to consider the issues raised by the plaintiff. To do so would constitute an application of the principle first stated in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) and later refined in *United States* v. *Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932); *Far East Conference* v. *United States*, 342 U.S. 570 (1952); and *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958). This court recently applied this doctrine in *Industrial Communications Systems, Inc., et al.* v. *Pacific Telephone & Telegraph Co.*, — F.2d — (9th Cir. 1974), and there found it inappropriate for a court to work out an accommodation of antitrust and regulatory law without the benefit of the appropriate agency's interpretation of

that regulatory law. *See* 3 Davis, *Administrative Law* § 19.05 (1958 ed.).

In considering the doctrine's application to the facts and posture of this case, we are confronted by a substantial difficulty. It consists of the fact that the plaintiff, together with other unsubsidized carriers, initiated a proceeding in 1969 before the Maritime Subsidy Board, Docket No. S-244, to consider the adoption of rules that would eliminate the alleged "double subsidy" which results from the receipt of operating differential subsidies while engaged in the carriage of substantial amounts of preference cargo. This proceeding resulted in the promulgation by the Maritime Subsidy Board of a final opinion and order in which the position was taken that ships receiving operating differential subsidies must carry at least 50 percent non-preference cargo. Both subsidized and unsubsidized carriers, not including the plaintiff here, challenged this rule of the Maritime Subsidy Board in the United States District Court for the District of Columbia. That court declared the rule invalid and held operating differential subsidies could not be limited because of the carriage of preference cargo. In doing so heavy reliance was placed upon Comptroller General Opinion D-159245, SRR10, 264 (1966) which reached a similar conclusion. This decision has been appealed to the Court of Appeals for the District of Columbia Circuit. *States Maritime International* (No. 74-1499) and *American Maritime Association* (No. 74-1502) v. *Peterson, Secretary of Commerce.*

The consequence is that to a degree the purpose of the primary jurisdiction doctrine already has been served. The Maritime Subsidy Board has spoken. The judicial challenge to its rule, however, is highly relevant to the disposition of this case. Affirmance of the district court's decision would strongly suggest, if not dictate, that the judgment of the trial court now before us be sustained while a reversal, in whole or in part, would suggest a thorough re-examination of the issues of this case in the light of such reversal. Thus, we find ourselves equipped with a substantial amount of guidance from an administrative agency but awaiting a judicial determination which inevitably will be influential in, and possibly controlling of, our disposition of this case. Under these circumstances we believe the proper course of action is to indicate our views with respect to the merits of the controversy before us, based on the administrative and judicial guidance presently available in the consolidated civil actions now before the District of Columbia Circuit. To remand to the district court with instructions to stay all proceedings until there has been an administrative determination of the precise issues before us in which the parties to this litigation participate appears to us to involve needless delay and expense. Therefore, we now turn to the merits.

II

We agree with the district court's holding that Title VI of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1171-1182, does not prohibit the carriage of preference cargo by subsidized carriers. In doing

so we reject the plaintiff's contention that an operating differential subsidy is proper only in those circumstances in which the subsidized carrier is in *direct* competition with foreign vessels with respect to available cargo. Foreign competition exists by reason of the presence of foreign carriers operating in the international shipping market whose rates are set by shipping conferences consisting of both foreign and domestic carriers. To limit operating differential subsidies to instances of *direct* competition would reduce the effectiveness of such subsidies quite substantially. As the district court noted the link between the rates set by subsidized domestic carriers, even when bidding for preference cargo, and those of foreign carriers is much too strong to justify withdrawing the subsidy from vessels transporting preference cargo. We have found nothing in the legislative history that requires such a withdrawal.

III.

We also are in accord with the district court's holding that the plaintiff has failed to establish a prima facie case of violation of section 810 of the Merchant Marine Act of 1936, 46 U.S.C.A. § 1227. The relevant part of that section reads:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is un-

> justly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

To support its contentions the plaintiff relies on that portion of the stipulation which establishes (1) that the defendants received operating differential subsidies; (2) that the defendants made bids for preference cargo which would yield revenues "less than fully distributed costs before crediting the operating differential subsidy," (Paragraph 3, Stipulation, n. 1); and (3) that defendants were aware that each was receiving a subsidy and submitting such bids but each was unaware of the actual bids of any other until published by the government.

Such facts are entirely consistent with a fully competitive system once it is determined that vessels transporting preference cargo are entitled to operating differential subsidies. Such a system is not "unjustly discriminatory or unfair" to a citizen of the United States who operates a domestic carrier. It is not made so by an awareness on the part of the defendants that each was submitting bids amounting to less than fully distributed costs. *Cf. Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963). Moreover, such bids enable the Federal Government to benefit through lower rates from the operating dif-

ferential subsidy. To permit the taxpayers to receive a direct return from a subsidy made available by their dollars surely cannot be contrary to an act of Congress in the absence of a very clear expression to that effect. Section 810 of the Merchant Marine Act of 1936 contains no such expression.

IV.

The trial court was correct in dismissing the plaintiff's claim that the defendants violated section 2 of the Sherman Act. As the trial court stated, the defendants constantly compete with each other and nothing in the stipulation or record shows that any defendant possessed the required monopoly power.

This would be sufficient to dispose of the plaintiff's appeal with respect to the Sherman Act were it not for the fact that it now insists that it should be given the opportunity to develop a factual record to support its claim. It is clear from the record of this case that the plaintiff relied heavily on the stipulation to establish the elements of a section 2 violation. That portion of its amended complaint pertaining to the violation of the antitrust laws, which is set out in the margin,[3] reflects this. It is also true that the district

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[3] Violation of the Antitrust Laws A. XVI.

Beginning at a date presently unknown to plaintiff, defendants, and each of them, have monopolized or have attempted to monopolize trade and commerce among the several states or with foreign nations; to effectuate such monopoly, and to attempt to monopolize, defendants:

A. Used the economic leverage of their operating differential subsidies to obtain defense, preference, and Public Law 480 cargoes by making unreasonably low bids to the exclusion of plaintiff.

court directed the plaintiff to submit "its brief on whether the use of subsidy by defendants on defense and preference cargoes is unlawful and, if so, what remedies are available to it." The brief prepared in response to this order relies almost exclusively on the facts appearing in the stipulation to support its claim of unlawful conduct on the part of the defendants under section 2 of the Sherman Act. Under these circumstances we do not thing the trial court erred in rendering judgment against the plaintiff on its Sherman Act claim. Obviously this judgment does not preclude the plaintiff from pursuing antitrust claims

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B. Forced the plaintiff out of business by cutting off its existing source of cargo;

C. Submitted bids beneath their actual fully distributed costs;

D. Unlawfully used their operating differential subsidies to obtain control of trade routes:

E. Utilized operating differential subsidies for the carriage of cargo limited by law to United States flag ships.

XVII.

The acts charged in this amended complaint to have been done by each of the defendant corporations were authorized, ordered and done by the officers, agents, employees or representatives of each defendant corporation while actively engaged in the management, direction or control of its affairs, and acting on its behalf within the scope of their employment or agency.

XVIII.

As a direct and proximate result of defendants' conduct as alleged, plaintiff was damaged and lost cargoes, all in an amount presently undetermined; plaintiff requests leave of court to amend this amended complaint when the amount of damages to plaintiff has been more definitely ascertained; plaintiff alleges on information and belief for the period January 1, 1969, to December 31, 1970, it has sustained damages in the sum of $4,145,875.76 as a direct and proximate result of the acts of the defendants.

against the defendants to the extent such claims are based on acts not appearing in the stipulation and not resting upon the making of bids for carriage of preference cargo that yield revenues "less than fully distributed costs before crediting the operating differential subsidy." As to claims based on such acts, the plaintiff has had its day in court.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA STEAMSHIP COMPANY, a corporation,	)	
Palintiff	)	Civil No.
vs.	)	71-132
AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,	)	ORAL OPINION
Defendants.	)	Sept. 6, 1972

SOLOMON, Judge:

THE COURT: I have listened to this argument. Frankly, I don't believe that any useful purpose will be served for me to take this matter under advisement and prepare a written opinion. When I read the stipulation and the briefs, I was convinced that the plaintiff had failed to establish a prima facie case that the defendants had engaged in any conspiracy or engaged in any concerted action of the type condemned by Section 810 of the Merchant Marine Act of 1936.

In spite of the eloquence of my friends for the plaintiffs, I don't think they have convinced me otherwise in shaping my views, because I believe that merely because two or more persons know that each of the other persons are receiving subsidies and they will take these subsidies into consideration when they submit bids on Government contracts is an insufficient basis upon which to predicate liability of the violation of Section 810.

I thought the stipulated facts showed that there was competitive bidding, not only among subsidized carriers, but also among the unsubsidized carriers.

As I pointed out earlier, this is not a situation where the defendants carved out territory, or there was collusive or fictitious bidding. Frankly, I don't think it makes any difference whether the subsidy used for that purpose is illegal or not.

I also believe the defendants are entitled to consider their subsidy when determining the amount of their bids as a matter of good business practice. I think you can explain everything that is in the stipulation on the basis of good business practice. I think you would have a terrible time to draw inferences of collusiveness from the facts as stated in the stipulation.

The defendants are entitled to an order dismissing the Section 810 count. I am not going any further, because I think that is the only thing that is submitted to me. I don't know what that does to the other portions of the lawsuit. I just can't believe there is anything sufficient in the stipulation to justify a continuing with this case on the 810 violation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA STEAMSHIP COMPANY, a corporation, Plaintiff, vs. AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC., Defendants.	Civil No. 71-132 OPINION Sept. 6, 1972

SOLOMON, Judge:

This case is now before the Court on the issue of whether Title VI of the Merchant Marine Act, 1936 (46 U.S.C. §§ 1171-1182), permits a subsidized United States flag carrier to bid on and carry preference or military cargo.

Plaintiff, Columbia Steamship Company (Columbia), is an unsubsidized carrier. In its original complaint against the defendants, all of whom are subsidized carriers, Columbia alleged that the defendants unlawfully received and used the subsidies paid them under Title VI. Columbia further alleged that the defendants also violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), Sections 15-18 of the Shipping Act (46 U.S.C. §§ 814-817), and Section 810 of the Merchant Marine Act, 1936 (46 U.S.C. § 1227).

Columbia alleged that as a result of these violations, it suffered a substantial loss of business and damages. It sought treble damages for the antitrust violations and compensatory damages for its other claims. Columbia also sought injunctive relief.

Columbia voluntarily dismissed its Section 1 Sherman Act (conspiracy count) violation, and I ruled that Columbia may not maintain the action against the defendant for a Section 810 violation because it failed to show that the defendants were acting "in concert" as required by that section.

Foreign vessels usually cost less to build and operate than American vessels. Congress, to foster a strong domestic fleet, passed the Merchant Marine Act, 1936, which authorized subsidies to United States built and operated vessels. These subsidies enabled American flag vessels to lower their shipping charges and compete with foreign flag vessels.

Several statutes give American flag vessels a preference over foreign vessels for civilian and military cargo.

> "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for

transporting like goods for private persons." 10 U.S.C. § 2631.

Another law requires various agencies of the government to give United States-flag commercial vessels preferences on certain cargo "which may be transported on ocean vessels . . ., to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas. . . ." 46 U.S.C. § 1241(b)(1).

Unsubsidized carriers, like the plaintiff, assert that they cannot compete with foreign flag vessels, and they must rely heavily on preference cargo. Until recently, because of the war in Southeast Asia, all American flag vessels, both subsidized and unsubsidized, were busy with military an other preference cargo. Because of the sharp reduction of American forces in Southeast Asia, the number of vessels available for preference cargo now greatly exceeds the demand. The subsidized vessels have been getting practically all of this cargo because they can underbid the unsubsidized carriers. Title VI of the Merchant Marine Act, 1936, authorizes a subsidy only if "the operation of [the] vessel or vessels in [the designated] service, route, or line is required to meet foreign-flag competiiton. . . ." 46 U.S.C. § 1171(a)(1).

Plaintiff asserts that under Title VI, American flag vessels may not carry preference cargo because foreign shippers do not compete for this cargo. The

Maritime Subsidy Board in proceeding S-244 [13 SRR 44], June 1, 1972, found that the plaintiff's reading of Title VI was too restrictive because it incorrectly assumed that preference cargo has no bearing on international competition. A large amount of preference cargo moves by rates that are influenced by foreign flag carriers. These rates are set by conferences made up of both American and foreign shippers and their determination directly affects the profits of American flag vessels.

I also agree with the Maritime Subsidy Board's conclusion that Title VI does not require that all cargo on a subsidized vessel be subject to foreign competition. Every portion of the cargo need not be carried in competition with a foreign vessel. Title VI subsidizes vessels. The carriage of some non-competitive cargo will not disqualify a vessel from receiving subsidies.

There is no merit in plaintiff's contention that defendants are guilty of a Section 2 Sherman Act violation. The defendants constantly compete with each other, and there is nothing in the record which shows that any defendant has the monopoly power proscribed by Section 2 of the Sherman Act.

Plaintiff's other contention that the defendants violated Section 16 of the Shipping Act (46 U.S.C. § 815) is equally without merit. This section is directed at a carrier's discrimination against shippers and not at competitive activty among carrers.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

The action is dismissed.

Dated this 6th day of September, 1972.

/s/ *Gus J. Solomon*
United States District Judge

APPENDIX B

15 U.S.C. § 2

§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

46 U.S.C. § 1227

§ 1227. *Agreements with other carriers forbidden; withholding subsidies; actions by injured persons for damages*

It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively em-

ploying vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

June 29, 1936, c. 858, § 810, 49 Stat. 2015

[§ 101]

MERCHANT MARINE ACT, 1936

(Revised through the 92nd Congress)
[49 Stat. 1985, approved June 29, 1936]

AN ACT

To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, to repeal certain former legislation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—DECLARATION OF POLICY

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. 46 U.S.C. 1101.

[§ 601(a)]

TITLE VI—OPERATING-DIFFERENTIAL SUBSIDY

SEC. 601.(a) The Secretary of Commerce is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States or in such service and in cruises au-

thorized under section 613 of this title. In this title VI the term "essential service" means the operation of a vessel on a service, route, or line described in section 211(a) or in bulk cargo carrying service described in section 211(b). No such application shall be approved by the Secretary of Commerce unless he determines that (1) the operation of such vessel or vessels in an essential service is required to meet foreign-flag competition and to promote the foreign commerce of the United States except to the extent such vessels are to be operated on cruises authorized under section 613 of this title, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than February 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns or leases, or can and will build or purchase or lease, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate in an essential service in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors, and is reasonably calculated to carry out effec-

tively the purposes and policy of this Act. To the extent the application covers cruises, as authorized under section 613 of this title, the Board may make the portion of this last determination relating to parity on the basis that any foreign flag cruise from the United States competes with any American flag cruise from the United States. 46 U.S.C. 1171(a).

[§ 602]

SEC. 602. Except with respect to cruises authorized under section 613 of this title, no contract for an operating-differential subsidy shall be made by the Secretary of Commerce for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Secretary of Commerce, after a full and complete investigation and hearing, shall determine that an operating-differential subsidy is necessary to meet competition of foreign-flag ships. 46 U.S.C. 1172.

[§ 603(a)]

[§ 603(b)]

SEC. 603. (a) If the Secretary of Commerce approves the application, he may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section, for the operation of such vessel or vessels in an essential service and in cruises authorized under section 613 of this title for a period not exceeding twenty years, and sub-

ject to such reasonable terms and conditions, consistent with this Act, as the Secretary of Commerce shall require to effectuate the purposes and policy of this Act, including a performance bond with approved sureties, if such bond is required by the Secretary of Commerce. 46 U.S.C. § 1173(a).

(b) Such contract shall provide, except as the parties should agree upon a lesser amount, that the amount of the operating-differential subsidy for the operation of vessels in an essential service shall equal the excess of the subsidizable wage costs of the United States officers and crews, the fair and reasonable cost of insurance, subsistence of officers and crews on passenger vessels, as defined in section 613 of this Act, maintenance, and repairs not compensated by insurance incurred in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 501(b)) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract: *Provided, however,* That the Secretary of Commerce may, with respect to any vessel in an essential bulk cargo carrying service as described in section 211(b), pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive

with the cost of operating similar vessels under the registry of a foreign country. For any period during which a vessel cruises as authorized by section 613 of this Act, operating-differential subsidy shall be computed as though the vessel were operating on the essential service to which the vessel is assigned: *Provided, however,* That if the cruise vessel calls at a port or ports outside of its assigned service, but which is served with passenger vessels (as defined in section 613 of this Act) by another subsidized operator at an operating-differential subsidy rate for wages lower than the cruise vessel has on its assigned essential service, the operating-differential subsidy rates for each of the subsidizable items for each day (a fraction of a day to count as a day) that the vessel stops at such port shall be at the respective rates applicable able to the subsidized operator regularly serving the area. 46 U.S.C. § 1173(b).

[§ 605(a)]

SEC. 605. (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the sub-

sidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade. 46 U.S.C. § 1175.

* * *

[§ 605(c)]

* * *

(c) No contract shall be made under this title with respect to a vessel to be operated in an essential service, served by citizens of the United States which would be in addition to the existing service, or services, unless the Secretary of Commerce shall determine after proper hearing of all parties that the service already provided by vessels of United States registry is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in an essential service served by two or more citizens of the United States with vessels of United States registry, if the Secretary of Commerce shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation

of vessels in such essential service, unless following public hearing, due notice of which shall be given to each operator serving such essential service, the Secretary of Commerce shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Secretary of Commerce, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as he may deem proper. 46 U.S.C. § 1175(c).

[§ 901(b)(1)]

TITLE IX—MISCELLANEOUS PROVISIONS

SEC. 901.

* * *

(b) (1) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per

centum of the gross tonnage of such equipment, materials or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographical areas: *Provided*, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of section 901(b)(1) and so notifies the appropriate agency or agencies; *And provided further*, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of Public Resolution Numbered 17, Seventy-third Congress (48 Stat. 500), as amended. For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which, subsequent to the date of enactment of this amendment, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three

years: *Provided, however,* That the provisions of this amendment shall not apply where, (1) prior to the enactment of this amendment, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be rebuilt abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment, or (2) where prior to the enactment of this amendment, the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment. 46 U.S.C. 1241(b).

made by Public Law 138, 84th Cong. (69 Stat. 288), Public Law

Title 10 U.S.C. § 2631

§ 2631. [*Military*] *Supplies: preference to United States vessels*

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for trans-

portation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. Aug. 10, 1956, c. 1041, 70A Stat. 146.

* * *

Title 15 U.S.C. § 616a

§ 616a. *Shipment of exports financed by Government in United States vessels*

It is the sense of Congress that in any loans made by the Reconstruction Finance Corporation or any other instrumentality of the Government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States, unless, as to any or all of such products, the United States Maritime Commission, after investigation, shall certify to the Reconstruction Finance Corporation or any other instrumentality of the Government that vessels of the United States are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates.

Mar. 26, 1934, c. 90, 48 Stat. 500; June 29, 1936, c. 858, Title II, § 204, 49 Stat. 1987.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1166

COLUMBIA STEAMSHIP COMPANY, INC.,
Petitioner

vs.

AMERICAN MAIL LINE LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., AND AMERICAN EXPORT ISBRANDTSEN LINES, INC.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals [Pet. A1-A14] is reported at 510 F.2d 29. The opinions of the district court [Pet. A-15-16, A-17-21] are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1975 [Pet. A-2]; its mandate was, how-

ever, not issued until November 18, 1975 [Pet. A-1, A-3]. The petition for writ of certiorari was filed on February 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the petition is timely.

2. Whether petitioner has accepted rulings which eliminate any claim by it for relief.

3. Whether operating-differential subsidy may under the Merchant Marine Act, 1936, be paid in respect of a vessel which carries Government "preference" cargo, reserved in whole or in part for carriage by U.S.-flag vessels.

STATUTES INVOLVED

The statutes considered by petitioner to be relevant are reprinted in Appendix B to the petition [A-22-33].

RESTATEMENT OF THE CASE

Each of the six respondent steamship lines receives operating-differential subsidy under the Merchant Marine Act, 1936. Petitioner filed complaint against them demanding treble damages on the theory that their receipt of such subsidy for voyages on which they carried Government preference cargo, reserved in whole or in part for carriage by U.S.-flag vessels, violated the Merchant Marine Act; the complaint asserted that petitioner could recover under (a) §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, (b) § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, or (c) §§ 15-18 of the Shipping Act, 1916, 46 U.S.C. § 815.

Petitioner sought a protective order against discovery and in connection therewith the parties entered into a

five paragraph stipulation of facts [Pet. A-3-5] designed to permit decision as to whether petitioner could allege any concert of action among respondents sufficient to ground the complaint.

It was for that limited purpose agreed: Respondents receive operating-differential subsidy under the Merchant Marine Act, 1936. All cargo shipped by the Department of Defense and 50% of that shipped by civilian agencies of the Government was reserved to U.S.-flag vessels. A significant part of respondents' cargo was of this preference category.[1] Military cargo was offered on the basis of competitive bids; each respondent when bidding knew that it and the other respondents received operating-differential subsidy. Petitioner was an unsubsidized carrier and, as respondents were aware, was dependent upon Government preference cargo for its economic survival.

Petitioner amended its complaint to eliminate its count under § 1 of the Sherman Act [Pet. A-18]. Chief Judge Solomon ruled that no sufficient concert of action was shown to base a complaint under § 810 of the Merchant Marine Act [Pet. A-15-16].[2] He subsequently held that the Merchant Marine Act, 1936, did not preclude the receipt of operating subsidy for voyages on which some preference cargo was carried, and that neither § 2 of the Sherman Act nor § 16 of the Shipping Act applied, as in this case, to subsidized carriers competing among themselves [Pet. A-19-20].

Petitioner abandoned its Shipping Act count on appeal. The Court of Appeals affirmed, holding: (a) The Merchant Marine Act, 1936, does not prohibit the carri-

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[1] Petitioner implies that the parties stipulated that 60% of the respondents' outbound cargo was preference cargo [Pet. 7]. They did not; the 60% figure was not confined to subsidized carriers [Pet. A-4-5].

[2] This ruling was by opinion of May 5, 1972, and order of June 2, 1972, not September 6, 1972, as shown at Pet. A-15.

age of preference cargo by subsidized vessels [Pet. A-9-10]. (b) § 810 was not violated, since the respondents had no concert of action but were competing for the cargo [Pet. A-10-12]. (c) § 2 of the Sherman Act was for the same reason not violated, and it was too late for petitioner to insist upon developing a factual record after pitching its case in the District Court on the stipulation.

The Court of Appeals took pains to ensure that its decision harmonized with related proceedings before the Maritime Administration and the federal courts in the District of Columbia. In *Carriage of Preference Cargo*, 13 SRR 44 (MSB, 1972), the Maritime Subsidy Board held that the 1936 Act was designed to subsidize vessels which were competitive with foreign-flag vessels and did not require that each lot of cargo be competitive; it went on, however, to hold that for the future subsidy would be reduced, on a sliding-scale, to the extent that more than 50% of freight revenues were derived from preference cargo. The Court of Appeals for the 9th Circuit agreed with the Board but undertook to reexamine its decision if the U.S. Court of Appeals for the District of Columbia Circuit should differ; to that end it directed that its mandate should not issue until the latter court should have decided the issue [Pet. A-3, 7-9]. The U.S. Court of Appeals in the District of Columbia by opinion of September 5, 1975, agreed with the Board and with the 9th Circuit. *States Marine International* v. *Peterson*, 518 F.2d 1070 (1975). The Court of Appeals for the 9th Circuit on November 18, 1975, directed that its mandate issue forthwith, and on December 15, 1975, denied petitioner's motion to recall that mandate.

A petition for writ of certiorari (as well as a protective cross-petition) to the U.S. Court of Appeals for the District of Columbia Circuit was denied on February 23, 1976. *American Maritime Association* v. *Richardson*, No. 75-800.

ARGUMENT

A. The Petition is Out of Time

A petition for writ of certiorari to review a civil judgment must be filed "ninety days after the entry of such judgment." 28 U.S.C. § 2101(c). Rule 26, Federal Rules of Appellate Procedure (FRAP), defines that entry of judgment to be the "notion of a judgment in the docket." The Court of Appeals docket notation of this judgment was entered on January 16, 1975.[3] Accordingly, the time for petitioner to seek a writ of certiorari expired on April 16, 1975. The petition was filed almost ten months later, on February 12, 1976. Since the time limitation is statutory, the untimeliness of the petition is a jurisdictional defect, necessitating its denial. *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267 (1942).

The Court of Appeals stay of the issuance of its mandate did not operate to extend the period within which the petition could properly be filed. The statutory event commencing that period is the "entry of judgment," not "issuance of mandate."[4]

Here the Court of Appeals deemed it "the proper course of action" to rule on the merits of the appeal and

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[3] The Clerk's memorandum noting the entry of judgment was on the same day mailed to all parties.

[4] *Comm'r* v. *Estate of Bedford*, 375 U.S. 283, 285-287 (1945), took an "order for mandate" as entry of the judgment because of the consistent understanding of the Second Circuit and its bar, but urged a revision of the unique practice of that Court. The practice could not in any case have survived the 1968 Rules of Federal Appellate Procedure.

FRAP 41(b) makes provision for a stay of mandate pending submission of a petition for certiorari. The Rule makes manifest that certiorari time does not await issuance of mandate before the statutory period commences. If certiorari time commenced only on issuance of mandate, it would run forever after a Rule 41(b) stay.

affirmed the judgment of the District Court, staying the issuance of its mandate until final disposition of the related cases in the D.C. Circuit. [Pet. A-3, 9]. The Court of Appeals thereby rendered a "final" judgment, one that would not change *unless* a specified event were later to occur. The court's latent power subsequently "to reopen or revise its judgment" does not alter the finality of the judgment originally rendered. *Market St. R. Co.* v. *Comm'n*, 324 U.S. 548, 551 (1945).[5]

Petitioner received notice of the date of entry of the judgment, as called for by FRAP 36, and thus suffered no uncertainty as to when the certiorari time commenced to run. *Cf. Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969). To preserve its rights, petitioner could have filed either a petition for rehearing in the Court of Appeals, or a timely petition for writ of certiorari in this Court, making due reference to the case pending in the D.C. Circuit. It did neither. The ninety-day period was designed precisely to avoid the unduly prolonged litigation which would follow if the petitioner could extend certiorari time by awaiting the occurrence of an unpredictable and fortuitous date such as the issuance of mandate. *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213 (1952); *Comm'r* v. *Estate of Bedford*, *supra*, 288 (1945).

B. Petitioner Has Waived All Claims for Relief

Petitioner, until its present petition, has always recognized that it is not sufficient to urge that respondents have unlawfully received operating-subsidy, and that petitioner must also show that it has a claim for relief per-

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[5] The judgment below is to be contrasted with one in which the judgment itself does not become final *until* the occurrence of an event. The distinction is the traditional one between conditions subsequent and precedent. In the latter case, the period for seeking a writ of certiorari would commence only upon the happening of the specified event, when the judgment first becomes "final." *See Zimmern* v. *United States*, 298 U.S. 167, 169 (1936).

mitting its recovery against respondents because of that alleged illegality. Petitioner, indeed, started out with four bases for its recovery. It abandoned § 1 of the Sherman Act when it amended its complaint. Its claims under the Shipping Act, 1916, were pressed only as to § 16 in the District Court and no appeal was taken from the adverse decision on § 16. The Court of Appeals, as well as the District Court, ruled against petitioner on its two remaining theories, that recovery could be based on § 810 of the Merchant Marine Act or § 2 of the Sherman Act [Pet. A-10-14]. Petitioner does not seek certiorari in respect of either of these rulings and must, therefore, be deemed to have accepted them.[6] It follows that it has now stripped itself of all grounds for its own recovery even if its argument were accepted that subsidy was unlawfully paid to respondents.

C. No Ground For Certiorari Is Shown

1. Petitioner does not claim that there is any conflict of lower court decision. There is, instead, a striking unanimity of decision. Two courts of appeals decisions, two district court decisions, and two agency decisions have each rejected, without a dissenting vote, petitioner's contentions. *Opinion of Controller General*, Op. B-159245, SRR 10,264 (1966); *Fact-Finding Hearing—Payment of Subsidy for Carriage of Preference Cargoes*, 13 SRR 44 (MSB, 1972); *Columbia SS Corp.* v. *American Mail Line*, Civ. No. 71-132 (D. Ore., unreported opinion of Chief Judge Solomon, Sept. 6, 1972, Pet. A 17-21); *Columbia SS Corp.* v. *American Mail Line*, 510 F.2d 29 (CA 9, 1975, Pet. A1-14); *American Maritime Association* v. *Peterson*, Civ. No. 1576-72 (D. D.C., unreported opinion of Judge Aubrey Robinson, Feb. 7, 1974); *States*

[6] Petitioner lists § 2 of the Sherman Act and § 810 of the Merchant Marine Act among the "statutes involved" [Pet. 3-4] and in its Appendix B [Pet. A-22-23] but does not include any claim for recovery thereunder either in its "Questions Presented" [Pet. 2] or in its "Reasons for Allowing the Writ" [Pet. 7-13].

Marine International v. *Peterson*, 518 F.2d 1070 (CADC, 1975), certiorari denied, No. 75-800, Feb. 23, 1976.

2. Petitioner advances no claim that the decision below is in conflict with any decision of this Court, nor that any major question of general applicability, whether of substance or of procedure, has erroneously been decided.

3. Substantially the same question was presented in *American Maritime Association* v. *Richardson*, No. 75-800, certiorari denied, Feb. 23, 1976.

D. The Merits

We believe petitioner's argument may fairly be summarized as follows: (a) U.S.-flag vessels need Government assistance [Pet. 8]. (b) Government preference cargo is one such form of assistance [Pet. 8-9]. (c) In 1936 Congress enacted another form—subsidy to meet the lower costs of foreign competitors [Pet. 9-10]. If there were no foreign competition, as in the domestic trades, there was no occasion for this subsidy[7] [Pet. 10-11]. (d) The decision of the Court of Appeals, allowing subsidy to be paid even though preference cargo is carried, frustrates the Congressional purpose, is "devastating" to the unsubsidized carrier, supplies a compulsion for all carriers to seek operating-subsidy and must therefore increase Government costs [Pet. 11-13]. These undocumented speculations, each of which we deny, can hardly admit of responsible discussion in complete separation from the underlying facts as to the American merchant marine, none of which is in this record.

In truth, there does not seem room for reasonable doubt that the Congress intended operating-subsidy to be paid even though preference cargo was carried. Specifically:

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[7] "Senator Crowley" upon whom petitioner twice relies [Pet. 10-12] was in truth a Mr. Crowley, Solicitor of the Post Office Department. The Black report, condemning the *1928* Act as a "murderous economic weapon" has no bearing on the 1936 Act [Pet. 11].

1. *The 1936 Act.* (a) The Merchant Marine Act, 1936, in six passages in §§ 601-603 [Pet. A-24-28] defines the necessity that subsidy be designed to meet foreign-flag competition. In every instance it speaks of "vessels" or "service, route or line," and never of particular cargoes.

(b) The principal cargo preference statutes—for military and Government-financed cargoes—antedated the 1936 Act.[8] That Act itself established three types of U.S.-flag preference. §§ 212(d), 405, 901(a), 46 U.S.C. §§ 1122(d), 1145, 1241(a). Yet there is not a word in the 1936 Act or in its history to suggest that the vessels subsidized under that Act could not carry these preference cargoes, or would be subject to subsidy abatement if they were carried.

2. *The Cargo Preference Legislation.* Throughout the 1948-1954 period of individually enacted preference provisions in connection with foreign relief legislation[9] the Congress explicitly recognized that the subsidized lines would share in the carriage of the preference cargo. As the House Merchant Marine & Fisheries Committee concluded after 1955 oversight hearings:[10]

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[8] These are quoted at Pet. A-32-33. It should, however, be noted that the military cargo preference law, 10 U.S.C. § 2631, was enacted April 28, 1904, not [as given Pet. A-33] on Aug. 10, 1956.

[9] Economic Cooperation Act, 62 Stat. 143; Amendments to E.C.A., 63 Stat. 50; Mutual Defense Assistance Act of 1949, 63 Stat. 714; Yugoslav Emergency Relief Assistance Act of 1950, 64 Stat. 1122; India Emergency Food Aid Act of 1951, 65 Stat. 69; Wheat for Pakistan Act of 1953, 67 Stat. 80; Famine Relief Act of 1953, 67 Stat. 476; Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 454; Mutual Security Act of 1954, 68 Stat. 832.

[10] H. Rep. No. 1818, 84th Cong., 1st Sess., p. 2. Similar statements are found, e.g., at 94 Cong. Rec. 3737-38; H. Rep. No. 220, 81st Cong., 1st Sess., pp. 2-3; Chairman Bonner, in Hearings on H.R. 1340 before House Committee on Merchant Marine & Fisheries, 81st Cong., 2d Sess., p. 197; 99 Cong., Rec. 7091; 99 Cong. Rec. 10083; 100 Cong. Rec. 9340; 100 Cong. Rec. 9343.

> "* * * if a vessel sails with empty or half empty holds under circumstances where his foreign competitor would lose money, the American owner likewise loses notwithstanding the subsidy paid on his operating expenses. He must have cargo, in other words."

3. *The Long Administrative Construction.* (a) The Board from 1936 to the present day has never refused or reduced a subsidy voucher because of the carriage of preference cargo, and in at least 21 formal proceedings, reaching from 1949 to 1974, has recognized that subsidized lines were carrying military or civilian preference cargo. For one of these many examples, in *American President Lines, Ltd.*, 6 SRR 1031, 1041 (1966), the Board in considering an application for subsidy noted that "the needs of moving defense cargo are considered when determining how much vessel capacity is needed for the trade * * *."

(b) The Comptroller General in Op. B-159245, SRR 10,264 (1966) followed much the line of reasoning indicated above and concluded—

> "* * * this legislative background and the long-established administrative practice must be considered as establishing that operating-differential subsidy is payable, without reduction, even though a part of the cargo carried on particular voyage is military cargo which is reserved for U.S.-flag vessels."

CONCLUSION

The petition is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

February 27, 1976

I hereby certify that in compliance with Rule 33 of this Court I have this day served three copies of the foregoing brief in opposition by first class mail, postage prepaid, upon Souther, Spaulding, Kinsey, Williamson & Schwabe, 1200 Standard Plaza, Portland, Oregon 97204.

Warner W. Gardner

BLEED THROUGH

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In the Supreme Court
of the United States

OCTOBER TERM, 1975

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Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In view of the Respondents' broadside attack upon both the procedure employed to bring this matter to the attention of the Court and the merits of the underlying claims, a brief reply is in order.

ARGUMENT

A.

Petition is Timely

Respondents contend that the Petition for a Writ of Certiorari was not timely filed. More particularly

they contend that the failure to petition within ninety (90) days of entry of a docket notation on January 16, 1975, by the Court of Appeals, precludes review by this Court. This contention is unfounded.

On January 16, 1975, the Court of Appeals entered an opinion which stated in pertinent part:

> ". . . We affirm but stay the mandate until there has been a final disposition of the appeal from the judgment in the consolidated civil actions 1576-72, *American Maritime Association* v. *Peterson, Secretary of Commerce,* and 1667-72, *States Marine International* v. *Paterson, Secretary of Commerce,* rendered by the United States District Court for the District of Columbia. Should the district court's judgment ultimately be affirmed, the mandate shall be issued forthwith. Should the district court's judgment ultimately not be affirmed, the mandate shall not be issued and the plaintiff's complaints will be reconsidered in light of the reasoning supporting the refusal to affirm." (App. A3)[1]

The procedure employed by the Court of Appeals was unique. There is no reported case in which a similar procedure has been utilized. The question is, of course, whether this opinion constitutes a "final" judgment against which petitioner's right to petition for certiorari accrues.

This is not an instance where a latent power of a court to revise or modify a judgment is involved. Rather the Court expressly reserved final determina-

[1] The reference to Appendix is to Petitioner's Petition for a Writ of Certiorari.

BLEED THROUGH

tion until the Court of Appeals for the District of Columbia ruled on a similar case. Finality was not simply conditioned upon the passage of time, as was involved in *Market Street Rail Co.* v. *Railroad Commissioner*, 324 U.S. 548 (1945), but rather upon independent review by another tribunal.

Certainly the Court of Appeals for the Ninth Circuit could not have contemplated the necessity of petitioner filing a protective petition for certiorari and possibly briefs upon the merits, with all of the expense necessarily attendant thereon, while it *expressly* reserved the right, with no time limitations specified, to enter a completely different judgment. It is respectfully submitted that finality did not attach to the judgment until the Ninth Circuit ruled upon the effect, if any, of the companion litigation.

Respondents contend that this is a judgment coupled with a condition subsequent and that therefore finality attached when the opinion was rendered because the condition subsequent failed to occur. Even if this Court adopted the "condition subsequent" analysis, the procedural facts do not permit its application. The United States Court of Appeals in the District of Columbia reversed the trial court decision and reinstated the findings and conclusions of the Maritime Subsidy Board. The condition subsequent having occurred, the Ninth Circuit's judgment could not have become final until November 18, 1975, the date when it directed the mandate to issue.

In summary, whether the issue is analyzed as in-

volving the definition of "finality" or under the theory of "condition subsequent," filing of the Petition was timely.

B.

Petitioner Has Waived No Claims For Relief

Respondents contend that petitioner has waived any claim for recovery because it does not expressly seek relief with respect to either § 810 of the Merchant Marine Act or § 2 of the Sherman Act. This contention is unfounded.

The Ninth Circuit held that Petitioner lacked a remedy under either the Sherman Act or under § 810 of the Merchant Marine Act of 1936. The underpinning for both determinations was a finding that ". . . vessels transporting preference cargo are entitled to operating differential subsidies. . . ." (A11). If this Court determines that granting of operating differential subsidy for carriage of preference cargo transgresses the Merchant Marine Act of 1936, the case should then be remanded to the Court of Appeals for the Ninth Circuit to reconsider its ruling with that fact in mind.

C.

Grounds for Certiorari Exist

Respondents misrepresent petitioner's contention with respect to the grounds it contends exist for grant of certiorari. Petitioner has made no claim that a con-

BLEED THROUGH

flict exists between lower court decisions.[2] Nor has it claimed that the decision of the Ninth Circuit was in conflict with any decision of this Court. It does contend that the decision has substantial national importance.[3]

At stake in this litigation is the question of whether an important segment of the Merchant Marine will survive. The effect of the respondents' use of operating differential subsidy to underwrite beneath-cost bids for carriage of preference cargo has been to destroy petitioner as a competitor and to injure or destroy other unsubsidized operators. The effects are not confined to petitioner but extend broadly to all other unsubsidized operators who are similarly situated. It further affects the military and economic stability of the country to the extent that its underpinnings are shored by the Merchant Marine. Can it thus be said, as respondents contend, that there is no major question of general applicability involved?

D.

The Merits

Respondents briefly summarize petitioner's contentions with respect to the merits and then supply a form of statutory response. The fallacies of their arguments can be briefly set forth:

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[2] Indeed, how could there be a conflict when the same judge sat by designation upon the panels of the only courts to consider the issue?

[3] See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, pp. 7-8.

1. 1936 Act.

(a) The Merchant Marine Act, 1936, defines the necessity that subsidy be designed to meet foreign flag competition. Respondents argue that the statutory reference to "vessels", "services", "route", or "line" supports the contention that the nature or type of cargo carried by a subsidized vessel is immaterial. If the nature of cargo carried were immaterial, then presumably subsidized vessels could carry one hundred percent (100%) preference cargo and never seek to carry the "commercial cargoes" which they were losing to foreign flag ships when the Act was passed. If it were intended by Congress that subsidized vessels could carry exclusively preference cargo, there would have been no purpose in enacting an operating differential subsidy. Further, the Maritime Subsidy Board would not have determined that future subsidy should be reduced, on a sliding scale, when more than fifty percent (50%) of freight revenues were derived from preference cargo. Carriage of Preference Cargo, 13 S.R.R. 44 (M.S.B., 1972). It is therefore certain that the nature of cargo carried is material and respondents' simplistic reference to "services", "route", or "line" should not be considered.

(b) Respondents next argue that the failure of the 1936 Act to expressly exclude subsidized vessels from carriage of preference cargo implies a congressional intent to permit such action. This argument is a double-edged sword for it could

fairly be inquired whether there is a single word within the statute expressly granting the right of a subsidized carrier to earn subsidy for carriage of preference cargo. The answer is, of course, no.

2. Administrative Construction.

Respondents contend that there has been a long, consistent administrative construction of this issue and that such interpretation now has the force of law. If this were so, why is it that the hearing examiner ruled squarely against respondents' contentions here and the Commission, recognizing the patent abuses, compelled partial abatement of subsidy?

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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